



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 10, 1994

Mr. George M. Kirk
Gottesman, McAllister & Kirk, P.C.
8 Greenway Plaza, Suite 802
Houston, Texas 77046

OR94-641

Dear Mr. Kirk:

You seek reconsideration of Open Records Letter No. 449 (1994), in which this office determined that the Texas Open Records Act, Government Code chapter 552, required the Smithville Independent School District (the "school district") to make certain information available to the public. We have assigned your request for reconsideration ID# 28527.

The school district, which you represent, received a request for "correspondence regarding [Texas Association of School Board's] reply to Mr. Edwards stating legal stand on grade changing . . . [as well as] any relating correspondence, documents, etc. from any legal remedies concerning this matter." You sought to withhold the requested information under section 552.107(1) of the Government Code and cited Open Records Decision No. 380 (1983). We concluded in Open Records Letter No. 449 that section 552.107(1) did not except the requested information from public disclosure.

We based our ruling in Open Records Letter No. 449 on your failure to explain facts sufficient to bring the requested records within the purview of section 552.107.¹

¹For example, you asserted that the attorney-client privilege protected the notes made of telephone conversations between the director of instruction and the Texas Education Association ("TEA"), as well as notes made of a communication between the director and the Texas Association of School Boards ("TASB"). You cited Open Records Decision ("ORD") No. 380, which concerned a letter from an attorney with the TASB to the Waco Independent School District, which had explained that it subscribed to a legal service provided by the TASB. However, you failed to explain how ORD No. 380 serves as authority to protect the communication between the director and the TEA; for example, you failed to provide facts indicating the existence of a protected attorney-client relationship between the school district (or the director acting on behalf of the school district) and the TEA, which is a state entity with regulatory authority over school districts. Similarly, unlike the school district in ORD No. 380, you failed to explain in what capacity the school district constituted a client of the TASB or otherwise to establish how the communication with the TASB representative fell within the protected attorney-client relationship.

Consequently, we concluded that Open Records Decision No. 380 was not controlling and that section 552.107(1) of the Government Code did not except the requested information from required public disclosure.

We have examined your request for reconsideration. Although you have provided us with additional information in an attempt to demonstrate the applicability of section 552.107(1), this information was not provided in your original request for a ruling from this office. Under the Open Records Act, the governmental body bears the burden of showing which exceptions apply to specific information and why. Attorney General Opinion H-436 (1974). Generally, a governmental body cannot provide additional arguments to withhold information in a request for reconsideration, unless there is a compelling reason to withhold the information. See Open Records Decision No. 515 (1988); see also Open Records Decision No. 630 (1994) (concluding that the mere fact that the information is within the attorney-client privilege does not alone constitute a compelling reason to withhold the information from public disclosure once the 10-day time period has elapsed). Therefore, we refuse to reconsider our ruling in Open Records Letter No. 449. Section 552.107 of the Government Code does not except the requested information from required public disclosure.

You also assert section 552.111 of the Government Code in your request for reconsideration. Section 552.111 excepts information that constitutes an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." You did not assert section 552.111 in your original request for a ruling. A governmental body may not raise additional exceptions after the 10-day deadline expressed in section 552.301 of the Government Code, including in a request for reconsideration, absent a showing of compelling interest. Open Records Decision No. 515. A governmental body can show a compelling interest by showing that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. You have not established that a compelling interest exists. Accordingly, you may not withhold the requested information under section 552.111 of the Government Code. The school district must release the requested information in its entirety.

If you have questions about this ruling, please contact this office.

Yours very truly,

A handwritten signature in cursive script, reading "Loretta R. DeHay".

Loretta R. DeHay
Assistant Attorney General
Open Government Section

Ref.: ID# 28527

Enclosure: Marked document

cc: Ms. Betty J. McBryar
310 Quail Run
Smithville, Texas 78957
(w/o enclosure)